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Reed v. Reed Appellant's Brief 1 Dckt. 41013

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STATEMENT OF THE CASE

A) NATURE OF THE CASE:

This is a divorce matter. The Appellant will hereinafter be referred to as Dr. Reed. The Respondent will hereinafter be referred to as Ms. Reed. The scope of this appeal will address Judge Wayman's valuation and award of some of the parties' community property, Judge Wayman's findings as to Ms. Reed's income for purposes of setting a child support amount, Judge Wayman's ruling that Dr. Reed should pay a portion of Ms. Reed's attorney fees and costs and Judge Wayman's rulings with respect to certain post trial motions.

B) TRANSCRIPT IDENTIFICATION: Transcripts have been prepared of the trial and several post trial hearings. The transcripts will be identified as follows and will be referred to in this Brief as follows:

TRIAL TRANSCRIPT. The trial took place on January 13 and January 14, 2011. References to the trial transcript shall be identified as the "TRIAL TRANSCRIPT" together with the appropriate volume, page and line number.

TRANSCRIPT: Court's Oral Decision Hearing: Judge Wayman announced his decision on the record on January 28, 2011. References to this transcript in this Brief shall be identified as "TRANSCRIPT: Court's Oral Decision Hearing", together with the appropriate page and line number.

TRANSCRIPT: Various Motions Hearing: Several motions were heard after trial which have been consolidated in one transcript. This transcript contains the transcripts for hearings which took place on April 22, 2011, July 25, 2011, September 28, 2011, and November 7, 2011. References to this transcript in this Brief shall be identified as "TRANSCRIPT: Various Motions Hearings", together with the appropriate page and line number.

TRANSCRIPT: January 23, 2012 Motions Hearing: On January 23, 2012, Judge Wayman ruled on several motions before him as well as a couple which had been taken under advisement at earlier hearings. References to this transcript in this Brief shall be identified as "TRANSCRIPT: January 23, 2012 Motions Hearing", together with the appropriate page and line number.

TRANSCRIPT: May 21, 2012 Motions Hearing: On May 21, 2012, a hearing was held on several motions, including a motion filed on behalf of Mountain Health Care, Inc., and Mountain Health Services, P.C., to pay cash to the Shoshone County Sheriff's Office in exchange for the release of the stock shares awarded to Dr. Reed in the two corporations. The shares were being held by the Sheriff's Office. This transcript will be referred to in this Brief as "TRANSCRIPT: May 21, 2012 Motions Hearing".

C) COURSE OF THE PROCEEDINGS:

Ms. Reed filed her divorce complaint on December 22, 2009. R. Vol. 1, p.45-55. The case went to trial on January 13 and January 14, 2011. At the end of the second day of trial, and based upon the agreement of the parties, Judge Wayman orally ordered that as of January 14, 2011, the parties would be deemed divorced. TRIAL TRANSCRIPT: Vol. II, p. 439, L. 20-25.

On January 28, 2011, Judge Wayman announced his decision and his decision is contained in the TRANSCRIPT: Court's Oral Decision Hearing. In accordance with his decision, Ms. Reed's attorney prepared an equalizing judgment in favor of Ms. Reed and against Dr. Reed in the amount of \$198,642.00. This judgment was entered on February 24, 2011. R. Vol. I, p. 98-99. In accordance with his decision, Ms. Reed's attorney also prepared a second judgement in favor of Ms. Reed and against Dr. Reed in the amount of \$10,000.00 for attorney fees and costs. This judgment was also entered on February 24, 2011. R. Vol. 1, p. 96-97. Neither judgment addressed property distribution, debt distribution, custody or child support.

On March 2, 2011, the first Motion for Reconsideration was filed by Dr. Reed. R. Vol. 1, p. 100-101.

The TRANSCRIPT: Court's Oral Decision Hearing, was completed on March 15, 2011. A copy of this transcript was attached to a cover sheet prepared by Ms. Reed's attorney which was entitled "FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECREE OF DIVORCE". This cover sheet, to which the TRANSCRIPT: Court's Oral Decision Hearing was attached, was signed by Judge Wayman and the cover sheet along with the transcript were filed with the Court on April 7, 2011. R. Vol. 1, p. 104-186.

Despite the designation of this document as a Final Decree, Dr. Reed does not believe that it constitutes either a “Judgment” or a “Decree”. **I.R.C.P.52 (a)** requires the Court to find the facts, state its conclusions of law and direct the entry of an appropriate judgment. The TRANSCRIPT: Court’s Oral Decision Hearing falls within the provisions of findings of fact and conclusions of law under **I.R.C.P.52(a)**. A “Judgment” or “Decree”, as that term is defined in **I.R.C.P.54(a)**, is not to contain the court’s legal reasoning, findings of fact or conclusions of law. Because most, if not all, of the TRANSCRIPT: Court’s Oral Decision Hearing consisted of Judge Wayman’s findings of fact and conclusions of law, the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECREE OF DIVORCE do not constitute a “Judgment” or “Decree” under **I.R.C.P.54 (a)**.

It is also obvious that Judge Wayman did not consider the statements he made during his decision to constitute either a “Judgment” or “Decree”. At the conclusion of his decision, as he asked Ms. Reed’s attorney to prepare an appropriate decree, prepare a judgment concerning litigation costs and also prepare an equalizing judgment. TRANSCRIPT: Court’s Oral Decision Hearing, p. 75, L. 1-8.

On June 20, 2011, an Amended Final Decree of Divorce was entered. R. Vol. 1, p. 208-229. This Amended Final Decree of Divorce divided and awarded the parties’ personal property and debts. It addressed custody and child support. In paragraph XVII of the Amended Final Decree of Divorce, Dr. Reed was again ordered to pay Ms. Reed \$198,642.00 to equalize the property distribution. R. Vol. 1, p. 218. This paragraph further provided that if Dr. Reed did not pay, the Court would sign a civil judgment in Ms. Reed’s favor upon presentment. In paragraph XVIII of the Amended Final Decree of Divorce, Dr. Reed was ordered to pay Ms. Reed attorney fees and costs in the amount of \$10,000.00. R. Vol. 1, p. 218-219. This paragraph also stated that if Dr. Reed did not pay, “...the Court shall sign a civil judgment upon presentment in favor of Plaintiff in the amount of \$10,000.00 to bear interest at the statutory rate.” Page 12 of the Amended Final Decree of Divorce (R. Vol. 1, p. 219) was signed by Ms. Reed’s attorney, who represented that she had no objection to either the form or content of the Amended Final Decree of Divorce.

On July 8, 2011, Ms. Reed applied for a writ of execution. The affidavit in support of the writ asked that a writ of execution be issued to collect on the two February 24, 2011 judgments. R. Vol. 1, p. 230-233. One writ of execution was issued with respect to both judgments. Neither the affidavit seeking the writ of execution nor the writ itself referred to either the Findings of Fact, Conclusions of Law and Final Decree of Divorce entered on April 7, 2011 (R. Vol. 1, p. 104-287) or the June 20, 2011, Amended Final Decree of Divorce.(R. Vol. 1, p. 208-229) as the judgments authorizing the issuance of the writ.

Ms. Reed did not obtain the civil judgments required by the Amended Final Decree of Divorce (R. Vol. I, p. 218-219) before she obtained the writ of execution. The writ incorporated both of the February, 2011, judgments, but erroneously stated that both judgments had been entered on February 22, 2011, instead of February 24, 2011. R. Vol. 1, p.234-239.

The writ was given to the Shoshone County Sheriff's Office to execute on Dr. Reed's 700 shares of stock in Mountain Health Care, Inc., and 200 shares of stock in Mountain Health Services, P.C.. On July 15, 2011, a return of service was filed with the Court stating that the writ of execution had been served on Terry Spohr as an agent for the corporations, but was being returned as unsatisfied. R. Vol. 2, p.307-316. In response to the Interrogatories which had been served on Mr. Spohr as agent for both corporations, the office administrator, Paula Olson, stated that no physical shares of stock had ever been issued. She further stated that Dr. Reed had been paid \$5,000.00 as a partial buy out of his interests in Mountain Health Services, P.C. R. Vol. 2, p. 310.

On July 18, 2011, Ms. Reed, through counsel, filed an objection to the answers provided by the corporations concerning the stock in both corporations. R. Vol. 2, p. 349-352. Part of the relief requested was an order from the Court requiring both corporations to issue the shares of stock Dr. Reed was entitled to receive and to deliver a sufficient number of shares to the Shoshone County Sheriff's Office to satisfy the judgments. This motion was scheduled for hearing several times with the actual hearing on the motion taking place on September 28, 2011.

On July 25, 2011, the first Notice of Appeal was filed on behalf of Dr. Reed. R. Vol. 2, p. 354-357.

On August 25, 2011, Dr. Reed filed a motion for stay seeking to stay execution on the writ until the motions for reconsideration his former attorney had filed could be heard. R. Vol. 2, p. 369-371. On September 16, 2011, he also filed an objection to Ms. Reed's request that the Court order the two corporations to issue the stock shares, which had been awarded to him, and deliver the shares to the Shoshone County Sheriff's Office. R. Vol. 2, p. 380-387. This motion was scheduled for hearing on September 28, 2011, at the same time as the motion concerning the stock filed by Ms. Reed's attorney.

A hearing on several of the motions discussed above took place on September 28, 2011. A transcript has been prepared of this hearing and is included as part of the TRANSCRIPT: Various Motions Hearing.

On September 30, 2011, an order was entered which required Mountain Health Services, P.C., and Mountain Health Care, Inc., to issue all of the stock certificates for all shares Dr. Reed held in either corporation and to deliver them to the Shoshone County Sheriff's Department. R. Vol. 2, p. 422-424. This Order required that this be done within 10 days. On April 19, 2012, the corporations filed a motion with the court wherein they stated that the shares had been delivered to the Shoshone County Sheriff's Office on October 7, 2011. R. Vol. 3, p. 705-707.

On October 21, 2011, a Brief in Support of Motion for Reconsideration was filed on behalf of Dr. Reed. R. Vol. 2, p. 467-485. On October 25, 2011, an Order was entered which stayed the execution of the money judgments provided Dr. Reed posted bond in the amount required by I.A.R.13 (b) (15). R. Vol. 2, p. 486-488. On October 25, 2011, an Amended Notice of Appeal was filed on behalf of Dr. Reed. R. Vol. 2, p. 489-494.

On October 19, 2011, Dr. Reed filed a motion for relief from judgment along with a supporting affidavit and memorandum. R. Vol. 2, p. 425-488. The hearing on this motion was scheduled for November 7, 2011, and was heard with Dr. Reed's motion to reconsider and motion to set aside the award of attorney fees in favor of Ms. Reed. The transcript of this hearing is located at TRANSCRIPT: Various Motions

Hearing, p. 68-99. Judge Wayman set aside the judgment for attorney fees discussed in the three orders set forth above but reserved ruling on the other motions filed by Dr. Reed. TRANSCRIPT: Various Motions Hearing, p. 93-95. On November 15, 2011, an Order was entered vacating the award of attorney fees contained in the previous judgments. R. Vol. 3, p. 567-569. This order directed Ms. Reed to file an appropriate application for the award of attorney fees within 14 days of November 7, 2011.

On November 21, 2011, Ms. Reed filed a Memorandum of Costs and Fees. R. Vol. 3, p 570-641. On December 2, 2011, Dr. Reed, through counsel, filed an Objection to the Memorandum of Costs. R. Vol. 3, p. 642-654. The Objection was scheduled for hearing on January 23, 2012. On December 2, 2011, a Second Amended Notice of Appeal was filed on behalf of Dr. Reed. R. Vol. 3, p. 665-659.

At the hearing which took place on January 23, 2012, Judge Wayman “reinstated” the \$10,000.00 judgment for a partial award of attorney fees. TRANSCRIPT: Motions Hearing, p. 12, L. 21-25. He found that his finding concerning the balance owed on one debt secured by the house awarded to Ms. Reed was high by \$2,000.00 and attributed this to a “scrivener”s error. TRANSCRIPT: Motions Hearing, p. 25, L.23-25. He reduced the equalizing judgment amount from \$198,642.00 to \$196,642.00 to correct this error. TRANSCRIPT: Motions Hearing, p. 25, L. 15-25, p. 26, L.1-10. On January 25, 2012, a Third Amended Notice of Appeal was filed. R. Vol. 3, p. 662-666.

On April 2, 2012, an ORDER ON MOTIONS was filed with respect to Judge Wayman’s rulings at the January 23, 2012, hearing. The District Court Clerk was asked to include this Order in the Clerk’s record but it was omitted. A certified copy of this ORDER ON MOTIONS was attached to a Motion to Augment which was filed with the Idaho Supreme Court in late November or early December of 2013. An order granting the motion to augment was entered on December 13, 2013. A Fourth Amended Notice of Appeal was filed on April 20, 2012. R. Vol 3, p. 714-718.

On April 20, 2012, a Motion for Entry of Qualified Domestic Relations Orders was filed by Ms. Reed. While the District Court Clerk was asked to include this Motion in the record, it was omitted. A

certified copy of this Motion for Entry of Qualified Domestic Relations Order was attached to the Motion to Augment which was filed with the Idaho Supreme Court in late November or early December of 2013. An order granting the motion to augment was entered by the Idaho Supreme Court on December 13, 2013.

A Fourth Amended Notice of Appeal was filed on April 20, 2012,. R. Vol. 3, p. 714-718.

On May 14, 2012, Dr Reed filed a Defendant's Response and Objection to Plaintiff's Motion for Entry of Qualified Domestic Relations Order. R. Vol. 4, p. 828-833. A hearing was held on May 21, 2012, and a transcript of this hearing has been prepared. It will hereinafter be referred to as "TRANSCRIPT: May Motions Hearing" as was discussed above. During the hearing, Judge Wayman ruled on several motions which had been filed by Ms. Reed's attorney.

The written judgment for attorney fees was not entered until June 8, 2012. R. Vol. 4, p. 876-878. Because the \$10,000.00 judgment for attorney fees had not been entered as of the date the Fourth Amended Notice of Appeal was filed on April 20, 2012, a Notice Concerning Entry of Final Appealable Order was filed with the Court on July 12, 2012 (R. Vol. 4, p. 950-955) to perfect the earlier appeal from the attorney fee award pursuant to the provisions of **I.A.R.17 (e) (2)**. This rule states that where a notice of appeal is filed from an appealable judgment or order before the formal written entry of such order, the appeal shall become valid upon the filing and placing of the stamp of the clerk of the court on the judgment or order. While this rule further states that the appeal will be deemed valid without the refile of the notice of appeal once the written order appealed from had been entered, the best course of action appeared to be to file a new notice of appeal.

On June 8, 2012, the Court entered several qualified domestic relations orders. R. Vol. 4, p. 879-900. On June 29, 2012, a further order was entered concerning the retirement accounts. R. Vol.4, p.938-945. Attached to the order were several Letters of Authorization directed to the entities managing the retirement accounts. The Letters of Authorization directed the transfer of the accounts from Dr. Reed's name to Ms. Reed. The order also appointed John Sahlin to sign these Letters of Authorization on behalf of Dr. Reed to

transfer the accounts to Ms. Reed. On June 15, 2012, Dr. Reed filed a Motion for Relief from Judgment Re: Mountain Health Services QDRO. R. Vol.4, p. 906-909.

On June 13, 2012, Ms. Reed applied for and obtained a new writ of execution. R. Vol. 4, p. 901-905. In her application, she again referred to the two judgments which had been entered in February of 2011. On July 12, 2012, a Motion to Quash Writ was filed by Dr. Reed. R. Vol. 4, p. 946-949. On August 13, 2012, a Memorandum in opposition to the motion to quash was filed on behalf of Ms. Reed. R. Vol. 4, p.977-987. On August 16, 2012, a Response Brief was filed to Ms. Reed's Memorandum. R. Vol. 4, p. 988-998. On August 16, 2012, an Amended Response Brief was filed on behalf of Dr. Reed. R. Vol. 5, p. 1042-1053. On August 20, 2012 a hearing was held on the Motion to Quash. Certified copies of the minutes of this hearing were attached to Dr. Reed's Motion to Augment record. On December 6, 2013, the Idaho Supreme Court granted the motion to augment and these minutes are now part of the record on appeal. As is shown in the minutes, Judge Wayman denied the motion to quash. No order has been entered with respect to this hearing. As of the date of the hearing, the briefing on Dr. Reed's first appeal had been completed.

On July 19, 2012, Dr. Reed tendered into the Court the sum of \$10,100.00 as full payment for the judgment against him for attorney fees. R. Vol. 4, p. 960-963. This tender was made pursuant to the provisions of **I.C.10-1115** to reserve the award of attorney fees in favor of Ms. Reed as an issue on appeal and to avoid an execution sale pursuant to the attorney fee judgment. Ms. Reed filed a motion on August 9, 2012, requesting that Judge Wayman enter an order directing that these funds be paid to her. The motion is missing from the present record. A hearing on this motion was scheduled for August 20, 2012, and after the hearing, an order was entered on August 30, 2012, directing that these funds be paid to Ms. Reed through counsel. This order was also omitted by the District Court Clerk in the Clerk's record. Dr. Reed filed a motion to augment the record with the Idaho Supreme Court dated November 26, 2013, and asked that the record be augmented with this order. A copy of the order was attached to the motion. The motion was granted. On September 4, 2012, Ms. Reed filed a satisfaction of judgment with respect to the money

judgment for attorney fees. R. Vol. 5, p. 1056-1057.

On September 4, 2012, Ms. Reed filed an affidavit to obtain a writ of execution and obtained a writ of execution to collect the February 24, 2011 Judgment for Equalization of Property Settlement, less \$2,000.00 which had been subtracted by Judge Wayman at an earlier hearing. R. Vol. 5., p. 1058-1061. On October 23, 2012, an execution sale was held in Shoshone County with respect to the sale of Dr. Reed's 700 shares of Mountain Health Care Inc., stock. Ms. Reed purchased these shares which Judge Wayman had valued at \$642,045.00 (TRANSCRIPT: Court's Oral Decision Hearing, p. 52, L. 14-18) with a credit bid in the amount of \$1.00 against her judgment. R. Vol. 5, p. 1106-1108. Dr. Reed's shares in Mountain Health Services, P.C. were also sold at this sale for \$15,000.00. R. Vol. 5, p. 1109-1111. Judge Wayman had valued these shares at \$34,000.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 56-L. 12-16. Mountain Health Services, P.C., however, had already paid Dr. Reed \$5,000.00 as a down payment on the purchase of these shares.

Briefs were filed on the first appeal with Dr. Reed's Appellant's Brief being filed on April 30, 2012, (R. Vol. 3, p. 719-768), Ms. Reed's Respondent's Brief being filed on May 30, 2012, (R. Vol. 4, p. 834-871) and Dr. Reed's Reply Brief being filed on June 20, 2012 (R. Vol. 4, p. 910-937). These Briefs covered the issues and orders addressed in the first appeal.

On July 17, 2012, a Notice of Appeal was filed. R. Vol. 4, p. 956-963. This appeal was from the four orders which had been entered in June of 2012, which included the written Judgment for Attorney Fees, the Order Granting Motion for Relief from Stay, the four QDROS, and the Order Re: Motion for Entry of Qualified Domestic Relations Order. (Listed on page 2 of the Notice of Appeal at R. Vol 4, p. 957). One of the orders appealed from, as stated in the Notice of Appeal, was the June 8, 2012, judgment for attorney fees. R. Vol. 4, p. 876-878. This issue was also addressed in the first appeal, but the determination was made to include this order in the Notice of Appeal to avoid any claim of waiver.

On October 31, 2012, Dr. Reed filed his Appellant's Brief in the second appeal. R. Vol. 5, p. 1114-

1146. On November 29, 2012, Ms. Reed's Respondent's Brief was filed. R. Vol.5, p. 1150-1178. Dr. Reed's Reply brief in the second appeal was filed on December 20, 2012. R. Vol. 5, p. 1179-1207. The parties stipulated to submit the appeals on the Briefs and it was ordered that the appeals would be decided on the Briefs. R. Vol. 5, p. 1208-1212. On April 5, 2013, a MEMORANDUM OPINION signed by Judge Griffin was filed. R. Vol. 5, p. 1213-1222. This Opinion decided all of the issues raised in both appeals filed by Dr. Reed. Parts of his decision will be addressed in the argument portion of this brief. The copy of his MEMORANDUM OPINION in the Clerk's Record was missing page 7. On December 6, 2013, the Idaho Supreme Court entered an order granting Dr. Reed's Motion to Augment to include a complete copy of Judge Griffin's MEMORANDUM OPINION.

In his MEMORANDUM OPINION, Judge Griffin denied Ms. Reed's request for an award of attorney fees on appeal. R. Vol. 5, p. 1219. On April 29, 2013, a separate order signed by Judge Griffin was entered denying Ms. Reed her attorney fees on appeal. R. Vol. 5, p. 1223. On May 8, 2013, a NOTICE OF APPEAL to the Idaho Supreme Court was filed by Dr. Reed. R. Vol. 5, p. 1225-1236. On May 22, 2013, a NOTICE OF CROSS-APPEAL was filed by Ms. Reed. R. Vol 5, p. 1237-1240, to seek review of Judge Griffin's decision to deny her request for attorney fees on appeal.

D. STATEMENT OF FACTS:

Although other issues will be addressed in this brief, the main issues to be addressed in this appeal concern the Court's determination of the value of the property awarded to Dr. Reed, the entry of an offsetting judgment in favor of Ms. Reed and against Dr. Reed in the amount of \$198,642.00, the decision to award certain corporate interests to Dr. Reed instead of ordering that they be sold and the award of attorney fees and costs.

The trial took place on January 13 and 14, 2011. On January 28, 2011, the Court orally announced its decision.

On page 69, at L. 11-15 of the TRANSCRIPT: Court's Oral Decision Hearing, and after Judge

Wayman had valued, divided and awarded all of the parties' property on the previous pages of the transcript, he concluded that the value of the property awarded to Dr. Reed was \$1,037,175.00. He found that the debts awarded to Dr. Reed were in the amount of \$210,129.00. He found that the net award to Dr. Reed was in the amount of \$827,046.00. This discussion is also located at R. Vol. 1, p. 176, L. 4-15.

On page 69, at L. 16-20 of the TRANSCRIPT: Court's Oral Decision Hearing, Judge Wayman found that the value of the property awarded to Ms. Reed was \$667,524.00. He found that she should pay debts in the amount of \$238,061.00. He stated that the net award to her was in the amount of \$429,063.00. Judge Wayman stated at p. 70, L. 6-9 of the TRANSCRIPT: Court's Oral Decision Hearing that in order to equalize the distribution of property and debts, a judgment in favor of Ms. Reed and against Dr. Reed should be entered in the amount of \$198,642.00. This discussion is also located at R. Vol 1, p. 176, L. 16-25, p. 177, L. 1-16.

Over half of the value of the assets awarded to Dr. Reed consisted of 700 shares of stock in Mountain Health Care, Inc.. These 700 shares were found by Judge Wayman to represent a 22.97 percent interest in the total ownership of this corporation. TRANSCRIPT: Court's Oral Decision Hearing, p. 45, L. 17-23. This can also be found at R. Vol. 1, p. 152, L. 17-23. Judge Wayman assigned these shares to Dr. Reed at a value of \$642,045.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 63, L. 19-21. This can also be found at R. Vol 1, p. 170, L. 19-21.

The primary assets of Mountain Health Care, Inc., were the office building and real property upon which the building was situated. In announcing his decision concerning the value of Mountain Health Care, Inc., Judge Wayman noted that according to the testimony of Stan Moe, the value of the real property and building owned by Mountain Health Care, Inc., was \$4,850,000.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 49, L. 15-19. (Also located at R. Vol 1, p. 156, L. 15-19.). Judge Wayman further stated that the testimony of Stan Moe with respect to the value of the building owned by Mountain Health Care, Inc., as of the date of the divorce was the most credible. TRANSCRIPT: Court's Oral Decision Hearing, p. 52,

L. 1-5. (Also located at R. Vol. 1, p. 159, L. 1-5).

Mr. Moe's Appraisal and Report was admitted as Plaintiff's Exhibit 57. In addition to being included as an exhibit on appeal, a copy of this Appraisal and Report can be found at pages 49-99 of the Clerk's Supplemental Record dated November 15, 2013. The following page numbers will be the Clerk's page numbers on the bottom of this Clerk's Supplemental Record.

The date of this report was February 4, 2009, and the report was addressed to Midwest Business Capital. (p.49). The date of the valuation and inspection was stated to be January 26, 2009 (p.52) which was almost two years before the trial before Judge Wayman which took place on January 13 and 14, 2011. According to this letter and as of January 26, 2009, the existing office building was found to be 16,686 square feet. (bottom of page 49)). It was contemplated that an additional 7,595 feet would be added (top of page 49). 4,720 square feet of the main floor of the proposed new addition was to be leased to Kellogg Physical Therapy (bottom of page 49) and the remaining 2,875 square feet was to be used for storage (bottom of page 49). The market value of the existing building as of January 26, 2009, was stated to be \$3,476,000.00 in the appraisal (top half of page 50). The appraisal further stated that the estimated market value of the building, when the additional square footage had been added to the existing building on the estimated completion date of September 30, 2009, would be \$4,818,000.00. (Top half of page 50). The appraisal finally stated that the "Market Value, At Stabilized Occupancy" was determined to be \$4,850,000.00. (Top half of page 50). The new construction had not started as of the date of the valuation.. (p. 57).

During trial, Mr Moe stated that the appraisal was done for a lender and that this was the intended use. He further stated that he didn't do an appraisal for the case and did not do an appraisal for either of the parties to the action. TRIAL TRANSCRIPT: Vol. I, p. 21, L 8-20. He stated that he had been retained by Ms. Reed to conduct a review of another appraisal which was done by Thomas Godbold. TRIAL TRANSCRIPT: Vol. I, p. 22, L 1-22. Mr. Godbold's appraisal, which was dated August 19, 2010, was

admitted as Plaintiff's Exhibit 58.

At the bottom of page 52 of Mr. Moe's February, 2009, appraisal (Plaintiff's Exhibit 57), he stated that, "Based upon the data and analysis presented in this report, we present our value conclusions for the subject property. Placing greater reliance on the Sales and Income Approach, we conclude the Fee Simple Estate, assuming all construction to be complete and occupancy stabilized at 95% is \$4,850,000.00".

At the time the appraisal was done, work had not even started on the addition. (Plaintiff's Exhibit 57, page numbered 4). At TRIAL TRANSCRIPT: Vol. I, p. 59, L. 1-5, Mr. Moe stated that he did not recall if "we" had been called back to verify that the work had been done. He stated that he had not gone through the building after the addition was completed, although he had observed it when he was driving past. TRIAL TRANSCRIPT: Vol. I, p. 59, L. 6-9.

According to Mr. Godbold's appraisal admitted as Plaintiff's Exhibit 58, and at page 6, the square footage of the main floor of the addition was found to be 4,488 square feet and not 4,720 square feet as was contemplated in the February, 2009, appraisal by Mr. Moe. According to Mr. Godbold's appraisal, the second floor of the addition was 2,725 square feet and not 2,875 square feet as was contemplated in Mr. Moe's February, 2009, appraisal. As built, the addition was 382 square feet less than the addition contemplated in Mr. Moe's February, 2009 appraisal. (7,595 s.f vs. 7,213 s.f),

Mr. Moe reviewed Mr. Godbold's report and prepared another report which was admitted as Plaintiff's Exhibit 62. He stated on page 2 of his report that the addition to the building was 7,213 square feet. This was the same figure used by Mr. Godbold in his report. Mr. Moe did not challenge Mr. Godbold's conclusion that the addition, as built, contained 382 square feet less than that forecasted in Mr. Moe's appraisal.

Paula Olson stated that she was the clinic manager for Mountain Health Services, P.C.. TRIAL TRANSCRIPT: Vol. I, p. 133, L. 13-20. She stated that the addition was completed in April of 2010, and that a certificate of occupancy was issued at that point. TRIAL TRANSCRIPT: Vol. I, p. 139, L. 13-25, p.

140, L. 1. She stated that there had been a change in the design of the addition during the construction phase and that the change resulted in less square footage. TRIAL TRANSCRIPT: Vol I, p. 140, L.15- 22. She stated that the building had to be moved back three to six feet so it would not go over a sewer line. TRIAL TRANSCRIPT: Vol. I, p. 141, L. 1-9.

On page numbered 38 of Plaintiff's Exhibit 57, Mr. Moe calculated the value of the addition to be \$1,400,000.00. When this amount is divided by the anticipated square footage of 7,585, the result is \$184.57 per square foot. The addition, as built, was 382 square feet less than the building which was contemplated in his appraisal. When the missing 382 square feet is multiplied by the cost per square foot of \$184.57, the result is \$70,505.70 and this should have been factored in to reduce the value of the building. This would have reduced the value of the Mountain Health Care, Inc., stock.

When asked if he was able to state that the real property was worth 4.8 million as of the date of his testimony (January 13, 2011), Mr. Moe stated that he was unable to do so. TRIAL TRANSCRIPT: Vol. I, p. 63, L. 13-15. He stated that he was unaware that the top floor of the addition was an empty shell. TRIAL TRANSCRIPT: Vol. I, p. 63, L. 23-15, p. 64, L. 1-2. Not surprisingly, Judge Wayman stated that "The fair market value of the building, which is really the fair market value of Mountain Health Care, Incorporated, it is a difficult question to answer in this case, because we—what we did not have was an expert opinion as to what the fair market value of that building of that asset was as of the date of the parties' divorce. None of the experts came in and said that. In fact, both Mr. Godbold and Mr. Moe specifically avoided saying that. They were not in a position to give that opinion." TRANSCRIPT: Court's Oral Decision Hearing, p. 46, L. 21-25, p. 47, L. 1-5.

Mr. Carlson testified with respect to the value of the assets and the amount of debt owed by Mountain Health Care, Inc. During his testimony, Mr. Carlson made it clear that the numbers he was using came from other sources. With respect to the value of the real property, he stated that he was not qualified to value the real property, but used the appraisals from others. TRIAL TRANSCRIPT: Vol. I, p. 184, L. 2-

22. He stated that he had relied on the appraisal by Thomas Godbold for the value of the real property. TRIAL TRANSCRIPT: Vol. I, p. 185, L. 6-13. He stated that the information with respect to the value of other items owned by Mountain Health Care, Inc., and its liabilities came from Mountain Health Care, Inc.'s December 31, 2009, financial statements. TRIAL TRANSCRIPT: Vol. I, p. 185, L. 15-25.

In arriving at the net value of Mountain Health Care, Inc., Judge Wayman had to consider the debts of this business. Judge Wayman based his findings as to the amount of the indebtedness on Mr. Carlson's testimony and determined that Mountain Health Care, Inc., owed \$2,439,739.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 52, L. 6-13. Mr. Carlson's opinion as to the amount of the debt owed by Mountain Health Care, Inc. was based on the information given to him by Mountain Health Care, Inc. and the information set forth on page 2 of Defendant's Exhibit G1. For the Court's convenience, a copy of this Exhibit is attached.

The debt amount of \$2,439,739.00, used by Judge Wayman, is identical to the debt amount shown on the second page of Defendant's Exhibit G-1 and must have been the source of both Mr. Carlson's and Judge Wayman's finding concerning the debt amount. Of this total, the long term debt was stated to be \$2,383,252.00. This would have been as of the end of December, 2009, and a little over a year before the trial in January of 2011. As of the date of trial, the actual debt amount on the building alone had been increased to "2.8 million" according to the testimony of Paula Olson. TRIAL TRANSCRIPT: Vol. I, p. 158, L. 14-21.

In the last sentence of the second paragraph of the first page of Defendant's Exhibit G1, Mr. Carlson stated that "The value of the Company's other assets and liabilities reported as of December 31, 2009 have been estimated and represent a relatively insignificant part of the overall value." The second page of this Exhibit sets forth the assets and liabilities of Mountain Health Care, Inc., as of December 31, 2009. The amount of the indebtedness owed as of December 31, 2009 was in the amount of \$2,439,739.00. This is the exact debt amount used by Judge Wayman to arrive at the net value of Mountain Health Care, Inc..

TRANSCRIPT: Court's Oral Decision Hearing, p. 52, L. 6-13. This figure, however, was over a year old as of the date of the trial. There was no testimony that as of the date of trial, this was the amount still owed by Mountain Health Care, Inc. The testimony by Ms. Olsen at trial established that Mountain Health Care, Inc., owed at least \$400,000.00 more as of the date of trial on just the building debt alone than was owed as of the end of 2009.

The long term debt shown on the second page of Defendant's Exhibit G1 for the building was stated to be in the amount of \$2,383,252.00 as of December 31, 2009. During the first day of trial on January 13, 2011, Paula Olson stated that the building loan balance was "2.8 million". TRIAL TRANSCRIPT: Vol. I, p. 158, L. 14-21. This debt would not include the two other debts listed on the second page of Defendant's Exhibit G1 which totaled a little over \$58,000.00. Judge Wayman's finding as to the amount of the indebtedness owed by Mountain Health Care, Inc., as of January 13, 2011, was off by at least \$400,000.00 and up to \$458,000.00 if the other two debts owed as of the end of 2009 were still owed as of January 13, 2011. By failing to use current debt information for Mountain Health Care, Inc, Judge Wayman ended up finding that Mountain Health Care, Inc., was worth at least \$400,000.00 more than what it was actually worth.

Using the appraisal done by Thomas Godbold,, which valued the land and building at \$2,500,000.00, and after adding in other assets of Mountain Health Care, Inc., Mr. Carlson came up with a gross value of \$2,874,886.00 for Mountain Health Care, Inc., on the right hand column towards the bottom of page 2 of Defendant's Exhibit G1. The other numbers on G1 which comprised the total have been circled. The other assets of Mountain Health Care, Inc., would have included "Net Current Tangible Assets" valued at \$131,227.00 and "Total equipment" valued at \$243,669.00.

When Mr. Carlson was being asked to use Mr. Moe's valuation of the building and land instead of Mr. Godbold's values, , Ms. Reed's attorney stated that the amount to be used was "4.86 million" (TRIAL TRANSCRIPT: Vol I, p. 186, L. 10-20) which was \$10,000.00 more than Mr. Moe's actual value of

\$4,850,000.00 as was stated in his report admitted as Plaintiff's Exhibit 57 (Clerk's Amended Record dated November 15, 2013 at page 50). When the increased amount of "4.86 million" was used by Mr. Carlson and added to the other assets from Defendant's Exhibit G1, he came up with \$5,234,866.00. TRIAL TRANSCRIPT: Vol. I, p. 187, L.1-2. This amount was the total gross amount Judge Wayman started with to arrive at the net value of Dr. Reed's interest in Mountain Health Care, Inc.. TRANSCRIPT: Court's Oral Decision Hearing, p. 52, L. 6-12. This figure would have been arrived at by adding the claimed value of the building and real property of \$4,860,000.00, (instead of \$4,850,000.00) with the amount for the net tangible assets and equipment circled on the second page of the attached copy of Defendant's Exhibit G1.

According to the second page of Defendant's Exhibit G1, the non-real property assets of Mountain Health Care, Inc., as of the end of 2009, consisted of \$131,227.00 for cash, cash equivalents and accounts receivable and \$243,659.00 for equipment. These items are circled on page 2 of the attached copy of Defendant's Exhibit G1. There was no testimony which established that over a year later and on January 13, 2011, Mountain Health Care, Inc., still held cash, cash equivalents and accounts receivable in the amount of \$131,227.00. There was no testimony which established that over a year later and on January 13, 2011, Mountain Health Care, Inc., still had equipment worth \$243,659.00.

When Paula Olson testified on January 13, 2011, she stated that Mountain Health Care, Inc., owned an x-ray machine which she valued at \$50,000.00. TRIAL TRANSCRIPT: Vol. I, p. 156, L. 9-17. In response to questioning by Ms. Reed's attorney, she agreed that the only assets held by Mountain Health Care, Inc., were the building, the land and the x-ray machine. TRIAL TRANSCRIPT: Vol. I, p. 156, L. 18-23.

In announcing his decision concerning the value of the real and personal property of Mountain Health Care, Inc., Judge Wayman relied, in part, on Plaintiff's Exhibit 63. This Exhibit was a four page statement from Zurich Insurance which summarized the items covered under the policy and the amounts which would be paid in the event of loss. Judge Wayman stated that this statement from the insurance

company represented Mountain Health Care, Inc.'s value of its real and personal property. TRANSCRIPT: Oral Decision Hearing, p. 49, L. 20-25. Based on this insurance statement, Judge Wayman stated that the value of the contents building of the was \$387,000.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 50, L. 1-3. This exhibit showed that the personal property was insured for \$387,000.00, but the level of coverages stated on Plaintiff's Exhibit 63 was replacement cost, not fair market value.

In discussing Plaintiff's Exhibit 63, Paula Olson stated twice that the contents of the building (as opposed to the personal property of Mountain Health Care, Inc.) were valued at \$387,000.00. TRIAL TRANSCRIPT Vol. I, p. 150, L. 6-18. The contents of the building would have also included the assets of Mountain Health Services, P.C. The estimated book value of the office equipment of this professional corporation was stated to be \$151,610.00 on Schedule 5 of Defendant's Exhibit G. The only competent evidence concerning the value of the personal property owned by Mountain Health Care, Inc., as of the date of trial in January of 2011 was Paula Olson's testimony. She stated that Mountain Health Care, Inc., owned x-ray equipment worth \$50,000.00 and that it did not own any other assets besides the land and the building. TRIAL TRANSCRIPT: Vol. I, p. 156, L. 6-23.

Because the evidence did not establish that Mountain Health Care, Inc., had personal property assets worth \$374,886.00 as of the date of trial, this figure should not have been used in arriving at the gross value of Mountain Health Care, Inc.. The figure of \$50,000.00 should have been used instead as this was the value of the x-ray machine according to Paula Olson and she also stated that other than the land and building, this was the only asset of Mountain Health Care, Inc.. Because the existence of another \$324,886.00 in assets as of the date of trial was not established by the testimony, Judge Wayman overvalued Mountain Health Care, Inc., by at least \$324,886.00 with respect to just the personal property assets alone.

The parties owned a 1/3 interest in real property located in Pinehurst, Idaho. This property was listed as Item number 13 on the Inventory of Property which was used as an aid at trial. Judge Wayman awarded this 1/3 interest to Dr. Reed at a value of \$15,200.00. TRANSCRIPT: Court's Oral Decision

Hearing, p. 63, L. 14. The competent evidence introduced at trial did not support a value above \$10,000.00 as will be discussed in the argument portion of this Brief.

Ms. Reed stated that she went back to work several months after she had separated from Dr. Reed. TRIAL TRANSCRIPT: Vol. II, P. 290, L. 14-24. Ms. Reed was deposed on September 13, 2010, and a copy of her deposition was admitted as Court's Exhibit 4. TRIAL TRANSCRIPT, Vol. II, p. 374-375. At the time of her deposition, she was working three nights a week. Court's Exhibit 4, p. 64, L. 6-13. She stated that her employment had changed from full time to something else at her own request. TRIAL TRANSCRIPT: Vol. II, p. 292, L. 20-25, p. 293, L. 1-4. As of the date of the trial, she stated that she was working an average of 24 hours per week. TRIAL TRANSCRIPT, Vol. II, p. 294, L. 21-25.

During her testimony, Plaintiff's Exhibit 43 was admitted. TRIAL TRANSCRIPT: Vol. II, p. 293, L. 7-23. This Exhibit stated that Ms. Reed was working 24 hours a week. She calculated her weekly gross income at \$789.28 per week and her yearly gross income at \$41,042.56 per year. Plaintiff's Exhibit 44 was also admitted at the same time as Plaintiff's Exhibit 43. Plaintiff's Exhibit 44 was Ms. Reed's work schedule and it reflected that she worked Friday, Saturday, Sunday and Monday every other week. This would average out to two 12 hour shifts a week.

Even though the evidence was uncontradicted that Ms. Reed averaged 24 hours a week, Judge Wayman stated that she was only working 24 hours every two weeks. TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 1-8. He found that she was making \$789.00 every two weeks, but this was Ms. Reed's average gross earnings for 24 hours each week. He found that Ms. Reed's yearly income was \$20,514.00 per year (TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 12-15) when Ms. Reed had correctly calculated her income for working 24 hours a week to be \$41,042.56 per year in Plaintiff's Exhibit 43.

ISSUES ON APPEAL

I

DID JUDGE WAYMAN ERR IN THE VALUATION AND AWARD OF THE SHARES OF STOCK IN MOUNTAIN HEALTH CARE, INC., AND DID JUDGE GRIFFIN ERR IN AFFIRMING HIS VALUATION AND AWARD.

II

WAS JUDGE WAYMAN'S DECISION TO VALUE THE COMMERCIAL LOT IN PINEHURST AT \$15,200.00 BASED ON SUBSTANTIAL AND COMPETENT EVIDENCE AND DID JUDGE GRIFFIN ERR IN AFFIRMING JUDGE WAYMAN

III

DID JUDGE WAYMAN CORRECTLY CALCULATE MS. REED'S INCOME FOR PURPOSES OF SETTING A CHILD SUPPORT AWARD

IV

WAS IT ERROR FOR MS. REED TO BE AWARDED A PORTION OF HER ATTORNEY FEES AND COSTS

V

WAS IT ERROR FOR JUDGE WAYMAN TO ORDER THE TWO CORPORATIONS TO ISSUE STOCK AND DELIVER THE STOCK TO THE SHOSHONE COUNTY SHERIFF

ARGUMENT

STANDARD OF REVIEW

The standard of review with respect to a district court's decision on appeal from the magistrate's division is addressed by the statements made in **Brinkmeyer v. Brinkmeyer**, 135 Idaho 586, 21 P. 3d 918 (2001). The Supreme Court is to review the decision of the magistrate independently, but with due regard, for the decision of the district court. Issues of law are subject to a free review standard. The magistrate's findings of fact will not be disturbed on appeal, even if the evidence is conflicting, if the factual findings are supported by substantial and competent evidence.

I

DID JUDGE WAYMAN ERR IN THE VALUATION AND AWARD OF THE SHARES OF STOCK IN MOUNTAIN HEALTH CARE, INC., AND DID JUDGE GRIFFIN ERR IN AFFIRMING HIS VALUATION AND AWARD.

Judge Wayman valued the 700 shares of stock held in Mountain Health Care, Inc., at \$642,045.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 53, L. 11-12. He awarded all of the shares of stock to Dr. Reed. TRANSCRIPT: Court's Oral Decision Hearing, p. 63, L. 19-21. When the judicially determined value of these shares of stock was added to the rest of the community property awarded to Dr. Reed, the distribution was unequal and Judge Wayman entered a judgment against Dr. Reed and in favor of Ms. Reed in the amount of \$198,642.00 to equalize the distribution. TRANSCRIPT: Court's Oral Decision Hearing, p. 70, L. 6-8.

In **Simplot v. Simplot**, 96 Idaho 239, 245, 526 P. 2d 844 (1974), the Idaho Supreme Court held that where stock shares are not divided between the parties to a divorce proceeding, but are assigned to one party, with an offsetting amount of other assets going to the other party, it is essential that the trial court make an accurate determination of the market value of the stock. In *Simplot*, the Idaho Supreme Court also stated that in valuing stock, the Court should determine the fair market value as distinguished from the book value. The

Idaho Supreme Court defined the “book value” of assets as the historical cost of an asset, adjusted for depreciation. (At page 245 Idaho).

As a general rule, community property is to be valued as of the date of divorce. **McAfee v. McAfee** 132 Idaho 281, 289, 971 P. 2d 734 (Ct. App. 1999). This would include shares of stock. **Josephson v. Josephson**, 115 Idaho 1142, 1150, 772 P. 2d 1236 (Ct. App. 1989). Because Judge Wayman ordered the marriage dissolved at the end of the second day of trial on January 14, 2011, (TRIAL TRANSCRIPT, Vol. II, p. 439, L. 6-25) the date of the divorce was January 14, 2011.

The long term debt shown on the second page of Defendant’s Exhibit G1 for the building was stated to be in the amount of \$2,383,252.00 as of December 31, 2009. Over a year later and on the first day of trial on January 13, 2011, Paula Olson stated that the amount owing on the building alone was “2.8 million”. TRIAL TRANSCRIPT: Vol. I, p. 158, L. 14-21. This debt would not include the two other debts listed on the second page of Defendant’s Exhibit G1, which totaled a little over \$58,000.00, assuming that they were still owing as of the marital dissolution date of January 14, 2011.

Based on Mr. Carlson’s testimony, which was based on Defendant’s Exhibit G-1, Judge Wayman found that Mountain health Care Inc, owed \$2,479,739.00. TRANSCRIPT: Court’s Oral Decision Hearing, p. 52, L. 10-13. His finding as to the amount of the indebtedness owed by Mountain Health Care, Inc., as of January 14, 2011, was low by at least \$400,000.00 for just the building alone and up to \$458,000.00 if the other two debts owed as of the end of 2009 were still owed as of January 14, 2011. By failing to use current debt information for Mountain Health Care, Inc, Judge Wayman ended up finding that Mountain Health Care, Inc., was worth approximately \$400,000.00 more than what it was actually worth.

Mr. Godbold’s finding that the addition to the building was 382 square feet less than the addition contemplated in Mr. Moe’s appraisal was not contradicted and was somewhat supported by the testimony of Ms. Olson. She testified that there had been an architectural change in the design of the addition during the construction phase which had resulted in less square footage. TRIAL TRANSCRIPT, Vol. I, p. 140,

L. 11-22. At \$184.57 per square foot, this decrease in the square footage could have decreased the value of the addition by \$70,505.70 as is discussed in the STATEMENT OF THE FACTS. In his review of Mr. Godbold's appraisal, Mr. Moe used the same square footage for the addition as did Mr. Godbold so, presumably, Mr. Godbold's opinion that the building addition contained less square footage than was set forth in the appraisal of the as yet unbuilt addition (Plaintiff's Exhibit 57) was not disputed by Mr. Moe.

The uncontradicted evidence at trial from Ms. Olson was that the only property that Mountain Health Care, Inc., had other than the building and land, was an x-ray machine worth \$50,000.00. The evidence did not establish that as of January 13 and 14, 2011, Mountain Health Care, Inc., still owned \$243,659.00 in equipment (from page 2 of Defendant's Exhibit G1), nor did it establish that Mountain Health Care, Inc., still had \$131,227.00 worth of cash, cash equivalents and accounts receivable as it did on December 31, 2009, and as reported on page 2 of Defendant's Exhibit G1.

Mr. Godbold's appraisal was admitted as Plaintiff's Exhibit 58. On page 17 of this report, he stated that he felt the value of the real property and building was \$2,500,000.00 as of July 28, 2010. On the bottom of page 49 and the top of page 50 of the TRANSCRIPT: Court's Oral Decision Hearing, Judge Wayman stated that Plaintiff's Exhibit 63 (the insurance form discussed above) represented an opinion from the owners valuing the building at \$3,750,000.00. He said that this statement from the owners directly impeached Mr. Godbold's opinion that the real property owned by Mountain Health Care, Inc. was worth \$2,500,000.00. He concluded by stating that he was not going to give Mr. Godbold's opinion any weight.

The third page of Plaintiff's Exhibit 63 shows that the corporation elected to purchase replacement cost insurance for the building and the building contents. This is different than purchasing insurance coverages to pay for the fair market value of the building or any personal property that might be destroyed in the future. In **State v. Smith**, 144 Idaho 687, 693, 169 P. 3d 275 (Ct. App. 2007), the Idaho Court of Appeals distinguished between market value, which was the reasonable price an owner would hold goods out for sale to the general public, and cost of replacement, which was stated to be the cost for the owner to

reacquire the same goods. In **Carter-Holmes v. Sousa**, 136 Or. App. 495, 901 P. 2d 932 (1995), the Court of Appeals of Oregon stated that under “cost of replacement”, the insurer was obligated to pay the actual amount expended to repair or replace insured property as opposed to the actual cash value of the property destroyed.

In the context of a divorce proceeding, the Court is to determine the fair market value of community property as of the date of the divorce, not the replacement cost. Plaintiff’s Exhibit 63 did not impeach Mr. Godbold’s opinion because he was stating his opinion as to the fair market value of the land and building owned by Mountain Health Care, Inc., not his opinion as to the replacement cost of the building.

In **Jensen v. Jensen**, 128 Idaho 600, 917 P. 2d 757 (1996), at page 606, Idaho, the Idaho Court of Appeals found that the magistrate had misinterpreted an Exhibit and based on this misinterpretation, had concluded that the Exhibit was unreliable. The Idaho Court of Appeals found that this misinterpretation had colored the magistrate’s view of the entire Exhibit. Similarly, Judge Wayman’s misinterpretation of Plaintiff’s Exhibit 63, which resulted in his conclusion that it set forth Mountain Health Care, Inc.’s opinion as to the fair market value of its assets, colored his opinion as to the weight to be given to Mr. Godbold’s testimony. Had this mistake not have been made, it is more likely that Mr. Godbold’s opinion as to the value of the building would have carried more weight and this may have changed Judge Wayman’s determination as to the value of the building and land owned by Mountain Health Care, Inc.

Dr. Reed’s 700 shares represented a minority interest in Mountain Health Care, Inc. This corporation was a closely held corporation. Judge Wayman did not discount the shares either because of the lack of a readily defined market for the shares or because the shares represented a minority interest in the corporation. The undersigned has been unable to locate an Idaho appellate case which discusses these discounts. In *Josephson*, at page 1149, Idaho, however, the Idaho Court of Appeals stated that the minority stock interests Ms. Josephson had been awarded by the trial court in two corporations were essentially valueless until the corporation could be liquidated because there was no ready market for the shares and she had no opportunity

for control. Similarly, there was and is no ready market for the shares awarded to Dr. Reed and the number of shares held by him would not give him control of Mountain Health Care, Inc.

In **IN RE MARRIAGE OF THORNHILL**, 200 P.3d 1083 (Colo. App. 2008), at page 1087, the Colorado Court of Appeals found that in the context of marital dissolution proceedings, a marketability discount should be applied in valuing the shares in a closely held corporation. The Colorado Court of Appeals noted that in other cases, marketability discounts of 10% to 35% had been approved. In **MATTER OF MARRIAGE OF TOFTE**, 134 Or. App. 449, 895 P. 2d 1387 (Or. App. 1995) the Court of Appeals of Oregon affirmed a 35% marketability discount and stated as part of its rationale at page 1392 Pacific that “Because a readily defined market for the shares of a closely held corporation generally does not exist, those shares are usually worth less than shares of a publicly traded corporation.” In *Tofte*, both parties had called experts to testify about the amount of the discount.

No expert was called concerning the amount of the discount which should be applied to Mountain Health Care, Inc., stock. As to Dr. Reed’s 20% in Mountain Health Services, P.C., however, Mr. Phelps testified that there should be a 20% minority interest discount, a 30% discount for lack of marketability and a total combined discount of 44%. TRIAL TRANSCRIPT: Vol. I, p. 122-123. The same owners were involved in both Mountain Health Care, Inc. and Mountain Health Services, P.C. and the percentages owned by Dr. Reed in both corporations were similar.

Judge Wayman’s valuation of Mountain Health Care, Inc., stock should be set aside because his determination as to the value of the stock was not accurate. The substantial value of these shares required the entry of an equalizing judgment against Dr. Reed and this equalizing judgment should also be set aside.

Dr. Reed had originally requested in his appeal before the District Court that the Magistrate Court be directed to take additional evidence on the value of the stock if the decision to award the stock to Dr. Reed was affirmed. Alternatively, he requested that the stock be ordered sold. In October of 2012, however, Ms. Reed purchased the 700 shares of stock Judge Wayman valued at \$642,045.00 for \$1.00 at an execution

sale. R. Vol. 5, p. 1106. These shares were subject to a buy-sell agreement which prohibited their sale to outsiders and required that they be sold back to Mountain Health Care, Inc.. A copy of this buy-sell agreement was attached to the AFFIDAVIT OF FREDERICK HALLER, M.D. IN SUPPORT OF GARNISHEE'S MOTION TO SUBSTITUTE CASH EQUIVALENT FOR SHARES OF STOCK SUBJECT TO GARNISHMENT which was filed on April 19, 2012. R. Vol. 3, p. 669-704. In his affidavit, Dr. Haller stated that the corporation was entitled to purchase the shares under the terms of the buy-sell agreement for \$143,183.60. R. Vol. 3, p. 671.

In both *Josephson* and *Simplot*, the appellate courts stated that the trial court was authorized to take additional evidence as to the value of the stock on remand if so desired. The disposition of community property is also subject to revision on appeal. **I.C.32-714**. With respect to shares of stock, the Idaho Supreme Court has also stated that the distribution of stock in a divorce decree does not become final until the appeal is heard and finally disposed of. **O'Brien v. O'Brien**, 71 Idaho 468, 474, 233 P.2d 1030 (1951).

The equalizing judgment against Dr. Reed should be reversed. When Ms. Reed executed on this judgment, she received \$15,000.00 from Dr. Haller when the Mountain Health Services, P.C., stock was sold. R. Vol. 5, p. 1109. Where a judgment has been vacated, it is a nullity, and the effect is as if it had never been entered. **State v. McFarland**, 130 Idaho 359, 361, 941 P.2d 330 (Ct. App. 1997). It has been stated that where a judgment creditor has received funds based on a judgment which is set aside, the judgment creditor must make restitution to the judgment debtor of the funds received. **Radermacher v. Eckert**, 63 Idaho 531, 538-539, 123 P.2d 426 (1942). Ms. Reed should be ordered to pay this amount to Dr. Reed, plus interest from October 23, 2012. The case should be remanded back to the magistrate court for further proceedings to address the present status of the shares of stock in Mountain Health Care, Inc., to reconsider the value of the shares, to reconsider the award of the shares themselves and to hear evidence on such matters as may be necessary to make an equitable award of the shares. To the extent that it may be necessary for another equalizing judgment to be entered, installment payments would be authorized under the *Josephson*

case cited above (at pages 1150 and 1151 Idaho). The holding in *Simplot* would also not prohibit Judge Wayman from ordering that the shares of stock be sold instead of holding a further hearing on the share value and this option should be left open for Judge Wayman.

II

WAS JUDGE WAYMAN'S DECISION TO VALUE THE COMMERCIAL LOT IN PINEHURST AT \$15,200.00 BASED ON SUBSTANTIAL AND COMPETENT EVIDENCE AND DID JUDGE GRIFFIN ERR IN AFFIRMING JUDGE WAYMAN

Judge Wayman awarded the commercial lot in Pinehurst to the Dr. Reed at a value of \$15,200.00. Transcript: Court's Oral Decision Hearing, p. 63, L. 14-16. The value of \$15,200.00 was not established by the testimony of Ms. Reed or by any witness called on her behalf. The only testimony by Ms. Reed with respect to this commercial lot is located at TRIAL TRANSCRIPT: Vol. I, p. 237, L. 1-20. In her testimony, she stated that this real property was also owned by her mother-in-law and one other couple. She stated that the property value had gone down significantly since the purchase. She stated that the value had been arrived at by dividing the amount in the tax notice by 3. A copy of the tax notice was provided as part of the pretrial compliance to Dr. Reed's former attorney and was marked as Plaintiff's Exhibit 8. The TRIAL TRANSCRIPT does not reflect that this exhibit was either offered or admitted. Ms. Reed did not state her opinion with respect to the fair market value of this 1/3rd interest in the lot as of the date of the trial.

Dr. Reed's testimony concerning this lot is located at TRIAL TRANSCRIPT, Vol. II, p. 321, L. 9-25, and the testimony was as follows:

"A. And if I had to put a value on it, I would accept that piece of property at 10,000. I—if the Court were to say, well, the value's \$10,000 and we can award it to Reed, I would be pleased with that. To me that's what it's worth.

Q. Okay.

MISS GRAHAM: We'll stipulate to that, Judge.

THE COURT: Stipulate to what?

MISS GRAHAM: \$10,000 to Dr. Reed. We didn't know what the value was."

Ms. Reed, through Ms. Graham, admitted that the lot was worth \$10,000.00 and should be awarded to Dr. Reed at that value. This admission was accepted by Dr. Reed. An admission made by an attorney at trial is binding on his or her client as a solemn admission. **McClellan v. City of Spirit Lake**, 91 Idaho 779, 783, 430 P. 2d 670 (1967).

At the hearing on the motion to reconsider, Judge Wayman stated that the evidence concerning the value of the lot was contained in The Inventory which was admitted at trial. TRANSCRIPT: January 23, 2012, Motions Hearing, p. 27, L. 1-6. The undersigned has been unable to locate any place in the record which proves that Court's Exhibit 1 was admitted. On page 4 of 5 of the index located in TRIAL TRANSCRIPT, Vol. 1, Court's Exhibit 1 is identified, but the index does not show that it was admitted as it does with respect to other exhibits admitted at trial. The only place Court's Exhibit 1 was discussed during trial is located at TRIAL TRANSCRIPT, Vol. I, p. 2 wherein Ms. Reed's attorney states that she is providing an extra copy of Court's Exhibit 1 to Judge Wayman.

In her Respondent's Reply to Appellant's Brief on Appeal at R. Vol. 4, p. 848, Ms. Reed contended that "The burden of proof is upon the Appellant to prove value. He testified about the value and his submission by stipulation of the Property List. *See Court's Exhibit 1* admitted by stipulation. (TRIAL TRANSCRIPT, Vol. 2, p. 293, L. 7-12)." Dr. Reed did not stipulate to the admission of Court's Exhibit 1 at any time during the trial. He agreed that the value of the lot was \$10,000.00 and could be awarded to him at that value. TRIAL TRANSCRIPT, Vol. II, p. 321, L 9-25. Ms. Reed's attorney agreed with this.

At TRIAL TRANSCRIPT, Vol. II, p. 290 -297, Ms. Reed was being asked questions by Dr. Reed's former attorney concerning her income and work schedule. At page 293, her attorney offered to admit Plaintiff's Exhibits 1,2,40,41,42,43,44 and Defendant's Exhibit L. They were all admitted. These exhibits pertained to Ms. Reed's work schedule, changes in her work schedule and the compensation she received.

None of these exhibits related to the value and distribution of the parties' property. Court's Exhibit 1 was neither offered nor admitted during this part of the trial nor during any other part of the trial to the best of the undersigned's knowledge.

A complete copy of Judge Griffin's Memorandum Opinion on Appeal was attached to Dr. Reed's Motion to Augment dated November 26, 2013. On the bottom of page 8 of his Memorandum Opinion, Judge Griffin affirmed Judge Wayman, with the exception of the QDRO distribution date, and concluded as to the other issues that "The Magistrate reached his decision on all other issues through reason and acted within the bounds of his discretion. There was substantial and competent evidence to support those findings and conclusions." Unfortunately, he did not state what part of the record he had reviewed which established that Court's Exhibit 1 had been admitted.

On page 3, in paragraph numbered 7 (b) of his Notice of Appeal to the Idaho Supreme Court, Dr. Reed requested that the Clerk's record include, "A copy of Court's Exhibit 1 (Property List) together with any record showing that it was admitted during the proceeding before the magistrate court, if any." R. Vol. 5, p. 1227. As prepared, the original 5 volumes of the Clerk's record did not contain a copy of Court's Exhibit 1.

On July 29, 2013, an Order was entered which required the District Court Clerk to supplement the record on appeal with a copy of Court's Exhibit 1 and also required the District Court Clerk to include any notations on the document which showed whether or not this exhibit had been admitted. A copy of this order is part of the Clerk's additional record dated September 9, 2013, and is located at pages 57-60 of this supplemental record. In response to this Order, the District Court Clerk did not produce any records which established that Court's Exhibit 1 had been admitted.

On September 23, 2013, an Order Requiring Corrections and Additions to Clerk's Supplemental Record on Appeal was entered. A copy is located at pages 180-184 of the Amended Clerk's record dated November 15, 2013. On the bottom of page 3 and the top of page 4 of this order, the Court Clerk was

ordered as follows:

“A copy of Court’s Exhibit 1 shall be included as part of the Clerk’s record on appeal in addition to being sent to the Idaho Supreme Court as an exhibit. The copy shall include any markings on the document which reflects whether or not it was admitted at the trial court level. The Clerk shall also make as part of its record any record which establishes that Court’s Exhibit 1 was admitted during the proceedings in front of the magistrate if this cannot be ascertained from a review of Court’s Exhibit 1.”

A copy of Court’s Exhibit 1 is located at pages 36-41 of the Clerk’s Amended record dated November 15, 2013. There are no indications on Court’s Exhibit 1 that it was admitted at trial. In response to the above order, the District Court Clerk did not produce any additional records which show that Court’s Exhibit 1 was admitted by Judge Wayman.

In **Donnelinger v. Donnelinger**, 107 Idaho 431, 690 P. 2d 366 (Ct. App. 1984) at page 439, the Idaho Court of Appeals held that pretrial submissions do not constitute evidence unless so provided in the pretrial order or stipulated by the parties. Neither of these exceptions existed. The only competent evidence of value of the Pinehurst commercial lot was the stipulation that it was worth \$10,000.00. Judge Wayman erred in finding that the value of \$15,200.00 was established by Court’s Exhibit 1 because this document was not admitted. Where the trial court’s findings are not based upon substantial and competent evidence, they must be set aside. **Wood v. Sadler**, 93 Idaho 552, 557, 406 P. 2d 42 (1970). The dollar amount of the total award to Dr. Reed should have been reduced by \$5,200.00 with an appropriate reduction in the amount of the equalizing judgment.

III

DID JUDGE GRIFFIN ERR IN AFFIRMING JUDGE WAYMAN’S DECISION CONCERNING MS. REED’S GROSS INCOME FOR PURPOSES OF SETTING A CHILD SUPPORT AMOUNT

The Idaho Child Support Guidelines (ICSGs) are located at **I.R.C.P.6 (c) (6)**. **Section 6 (c) (1)** of the ICSGs states that if a parent is voluntarily underemployed, child support shall be based on gross potential income. In **Kornfield v. Kornfield**, 134 Idaho 383, 3 P. 3d 61 (Ct. App. 2000), the Idaho Court of Appeals affirmed the trial court’s decision to impute income to a registered nurse where the trial court had found that

she was voluntarily unemployed.

According to Ms. Reed, she had been working as an R.N. three shifts a week for a total of 36 hours per week. TRIAL TRANSCRIPT, Vol. II, p. 291, L. 2-12. She stated that her employment had changed from full time to part time because of Dr. Reed's addiction. TRIAL TRANSCRIPT, Vol. II, p. 292, L. 21-25, p. 293, L. 1-2. She stated that she had voluntarily reduced her work hours. TRIAL TRANSCRIPT, Vol. II, p. 293, L. 25, p. 294, L. 1-10. At the time of trial, she stated that she was averaging 24 hours per week. TRIAL TRANSCRIPT, Vol. II, p. 294, L. 21-23.

During her testimony, several exhibits concerning the hours she worked and her income were admitted as Plaintiff's Exhibits 1, 2, 40, 41, 42, 43, 44, and Defendant's Exhibit L. TRIAL TRANSCRIPT, Vol. II, p. 293, L. 5-23. Plaintiff's Exhibit 43 established that for working 24 hours a week, her gross annual income would be \$41,042.56. In Plaintiff's Exhibit 43, she calculated her gross income for working two shifts a week at \$789.29 per week. This amount was multiplied by 52 weeks which resulted in a total of \$41,042.56 on an annual basis.

Judge Wayman stated when he announced his decision that, "... But she could work full-time, she chooses not to. And that's her choice. But looking at the Guidelines, I think I have to impute a certain amount of wages to her as if she was working full-time." TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 16-18. After deciding that under the Guidelines he had to impute wages to Ms. Reed as if she was working on a full time basis, he erroneously found that she was working only 24 hours every two weeks. TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 3-7. He then stated that her gross income per weekend that she was working was \$789.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 10-12. He multiplied this amount by 26 weeks and came up with \$20,514.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 12-15. He imputed an additional \$20,514.00 of income for purposes of computing the support amount and stated that her gross income for purposes of child support would be \$41,028.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 33, L. 4-8. This, however, was the amount that she was

actually making for working an average of two twelve hour shifts a week.

By imputing the earnings which would be generated by Ms. Reed if she worked an additional shift per week, or 36 hours per week as she had been working, her imputed income would be \$61,542.00 per year instead of \$41,028.00. Even Ms. Reed's attorney conceded that this was the amount Ms. Reed would earn annually if she was working on a full time basis. At TRANSCRIPT: Various Motions Hearing, p. 82, L. 18-21, Ms Graham stated that "If she was working full-time it would be 61,542." This is the amount Judge Wayman should have used to compute the child support amount.

On appeal to the District Court, in his Memorandum Decision, Judge Griffin, affirmed Judge Wayman with respect to the amount of child support but stated in his Memorandum Opinion that "...In orally announcing his decision the Magistrate seemed to indicate that Stephanie, at the time of trial, was only working 24 hours every two weeks instead of 24 hours per week. The Magistrate therefore doubled his estimate of Stephanie's current income (\$20,514.00 per year) to arrive at the final income figure of \$41,028.00 per year. It appears from Exhibit #43 that Stephanie was, at the time of trial, actually working every weekend and earning approximately \$41,028.00 per year." (R. Vol. 5, bottom of page 1217 and top of page 1218). He also stated, in part, that "The court considered a work schedule that permitted Stephanie to continue to meet responsibilities for caring for the parties' children during the week." R. Vol V, p. 1217.

During Dr. Reed's testimony at trial, he stated that his oldest child was 14 and his youngest child was 6. TRIAL TRANSCRIPT, Vol. II, p. 370, L. 8-15. None of the three children were, therefore, less than 6 months of age at the time of trial.

The court is required to impute full time income to a voluntarily underemployed parent unless that parent is caring for a child less than 6 months of age. **I.R.C.P.6 (c) (6), Section 6(c)(1)**. Because none of the parties' three children were less than 6 months of age, this exception was not applicable. The Court may depart from the Guidelines only if it finds that the evidence establishes that the amount of child support required by the guidelines would be inappropriate and sets forth on the record the dollar amount that the

Guidelines would require and the circumstances justifying a departure from the Guidelines. **I.R.C.P. 6 (c) (6), Section 3.** In his decision, Judge Wayman clearly stated he was going to impute income to Ms. Reed because she was voluntarily underemployed. He did not conclude, as Judge Griffin infers, that he could depart from the Guidelines because Ms. Reed had to continue to meet responsibilities for caring for the children.

Judge Wayman's error was a math error. Judge Griffin found that Judge Wayman had erred mathematically, but affirmed Judge Wayman's decision on a basis that is not entirely clear. It appears that Judge Griffin felt that Judge Wayman could depart from the Guidelines because of the custody arrangement which required Ms. Reed to care for the three children. Judge Wayman, however, expressly stated that under the Guidelines he was required to impute income to Ms. Reed. Neither Judge Wayman nor Judge Griffin made any express findings as to the amount of imputed income for Ms. Reed and the amount of child support which would be required by the Guidelines based on her imputed income as is required by Section 3 of the Guidelines. .

"The relevant inquiry in determining an abuse of discretion is whether or not the trial court; (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the choices before it; and (3) reached its decision by an exercise of reason." **Barrett v. Barrett**, 149 Idaho 21, 23, 232 P. 3d 799 (2010).

If Judge Wayman intended to depart from the Guidelines, he abused his discretion when he failed to "...set forth on the record the dollar amount of support that the Guidelines would require and set forth the circumstances justifying the departure from the Guidelines...." as was and is required by **I.R.C.P.6 (c)(6) Section 3.** When he announced his decision, however, he stated that "...But she could work full-time, she chooses not to. And that's her choice. But looking at the Guidelines, I think I have to impute a certain amount of wages to her as if she was working full-time." TRANSCRIPT: Court's Oral Decision Hearing, p. 32, L. 12-16.

By working one more 12 hour shift a week for a total of 36 hours a week, Ms. Reed's gross yearly income would be \$61,542.00 per year. This amount was stated to be correct by Ms. Reed's attorney if Ms. Reed was working full time. This Court should find that Judge Wayman should have used \$61,542.00 as Ms. Reed's potential income for purposes of setting the child support amount . The matter should be remanded back for Judge Wayman to recalculate the correct child support amount using this gross yearly amount and to also change the ratio concerning the amount each of the parties is to pay for uncovered expenses associated with the children.

IV

WAS IT ERROR FOR MS. REED TO BE AWARDED A PORTION OF HER ATTORNEY FEES AND COSTS

A. MS. REED'S REQUEST FOR ATTORNEY FEES AND COSTS SHOULD HAVE BEEN DENIED BECAUSE SHE FAILED TO MAKE A TIMELY AND PROPER REQUEST FOR AN AWARD OF FEES AND COSTS:

On January 28, 2011, Judge Wayman orally awarded Ms. Reed a judgment in the amount of \$10,000.00 for a partial award of her attorney fees and costs. TRANSCRIPT: Court's Oral Decision Hearing, p. 74, L. 9-20. At the time he made this award, Ms. Reed had not filed a Memorandum of Costs and Fees and Dr. Reed had not had the opportunity to object to any of her claimed fees and costs. On February 24, 2011, a written judgment for attorney fees was entered. R. Vol. 1, p. 96-97.

In **Medical Recovery Services, L.L.C. v. Jones**, 145 Idaho 106, 175 P. 3d 795 (Ct. App. 2007), the trial court awarded attorney fees before a memorandum of fees and costs had been filed. The Idaho Court of Appeals held that this was error and stated at page 110 Idaho that:

"In this case, the magistrate acted prematurely and improperly at the January 23, 2006 hearing by awarding a specific amount of attorney fees before having received a Rule 54(d)(5) memorandum of costs and fees and Rule 54(e)(5) affidavit which are necessary for the application of the Rule 54(e)(3) factors."

Judge Wayman recognized his error. At the hearing which was held on November 7, 2011, he found that the judgment for attorney fees should not have been entered without giving Dr. Reed the opportunity to challenge the amount under Rule 54. He set aside the judgment for attorney fees. TRANSCRIPT: Various Motions Hearings, p. 94, L. 5-11. On November 15, 2011, an Order was entered which set aside the February 24, 2011, \$10,000.00 Judgment for Attorney Fees. R. Vol. 3, p. 567-569. The Order further stated that if Ms. Reed wished to pursue her claim for an award of fees and costs, she was required to file an appropriate memorandum of fees and costs within 14 days. A Memorandum of Costs and Fees was filed on behalf of Ms. Reed on November 21, 2011. R. Vol. 3, p. 570-641. An Objection to and Motion to Disallow Attorney Fees and Costs was filed on December 2, 2011. R. Vol. 3, p. 642-652.

I.R.C.P.54(d)(5) states that a memorandum of costs must be filed within 14 days after the entry of judgment. This Rule further provides that the failure to do so constitutes a waiver of the right to seek fees and costs. The last judgment (and the only final judgment from Dr. Reed's perspective) which was filed in the case was the Amended Decree of Divorce which was entered on June 20, 2011. R. Vol. 1, p. 208-229. Ms. Reed did not file her memorandum of costs within 14 days of the date of the entry of the Amended Decree of Divorce. Dr. Reed asserted this as one basis to deny the request for fees and costs in his Objection to and Motion to Disallow Attorney Fees and Costs referred to above.

In ruling on the timeliness objection, Judge Wayman stated that he did not think Ms. Reed was required to file a memorandum of fees and costs where he had already set the amount and entered a judgment for the fees and costs. TRANSCRIPT: January 23, 2012 Motions Hearing, p. 6, L. 1-8. The above quoted language from the *Medical Services Recovery, L.L.C* case, however, would establish otherwise. Awarding a judgment for fees and costs without requiring Ms. Reed to file a memorandum of fees and costs and without affording Dr. Reed the opportunity to object was premature and improper. Judge Wayman did not cite any authority for ruling that his error in failing to follow the rules concerning seeking an award of attorney fees excused Ms. Reed from the requirement of filing a timely cost bill within 14 days of the date

of the final judgment.

In the next paragraph, Judge Wayman stated that after he had set the attorney fee judgment aside, he had given Ms. Graham a date to timely file a memorandum of costs. Since she had complied, he found that the November, 2011, fee request was timely filed. TRANSCRIPT: January 23, 2012 Motions Hearing, p. 6, L. 9-14. **I.R.C.P.6(b)** permits the Court to enlarge time if the request to enlarge time is made before the expiration of the period originally prescribed. This part of the rule was not applicable because no request for an enlargement of time to file a request for fees was made within 14 days of the date of the entry of the Amended Decree of Divorce in June of 2011. **I.R.C.P.6(b)** also allows the time to be enlarged after the time has run when requested by motion and upon a showing of excusable neglect. Ms. Reed did not move to enlarge the time to file her Memorandum of Fees and Costs nor did she claim that her failure to timely file a cost and fee request was the result of excusable neglect. Judge Wayman made no finding that the failure to timely file a fee request was the product of excusable neglect. Ms. Reed's request for an award of attorney fees and costs should have been denied because it was untimely.

The only attorney fee statute cited in Ms. Reed's Memorandum of Fees and Costs was **I.C.12-120 (3)**, which pertains to the award of fees in a civil action to recover on an open account, account stated, note, bill, etc.. R. Vol. 3, p. 572. The Memorandum of Attorney Fees and Costs (R. Vol. 3, p.570-641) filed by Ms. Reed's attorney did not cite either **I.C.32-704** or **I.C.32-705** as the basis for the request for fees and costs. In **KEB ENTERPRISES, L.P. v. Smedley**, 140 Idaho 746, 101 P. 3d 690, (2004), at page 754, Idaho, the Idaho Supreme Court held that "In order to be awarded attorney fees, a party must actually assert the statute or other basis for the award." In **Bingham v. Montane Resource Associates**, 133 Idaho 420, 987 P. 2d 1035 (1999), the Idaho Supreme Court held, in part, at page 424 Idaho, that the District Court was not empowered to award fees on a basis not asserted by the moving party.

The Memorandum of Fees and Costs filed by Ms. Reed did not cite either **I.C.32-704** or **I.C.32-705** as the basis of the fee request made by Ms. Reed. Judge Wayman erred in awarding Ms. Reed fees under

either of these two statutes when they were not stated to be the basis for the request for an award of fees.

B: THE FACTS INTRODUCED AT TRIAL DO NOT SUPPORT AN AWARD OF ATTORNEY FEES UNDER **I.C.32-704** and **I.C.32-705**

Judge Wayman's earlier award of attorney fees was made pursuant to the provisions of **I.C.32-704** and **I.C.32-705**. TRANSCRIPT: Court's Oral Decision Hearing, p. 71-72. Citing **Jensen v. Jensen**, 128 Idaho 600, 917 P. 2d 757 (1996), Judge Wayman stated that a disparity in incomes is generally sufficient to justify an award of attorney fees under **I.C.32-704 (3)**, although an award might not be appropriate when a party has the financial resources necessary to prosecute or defend the action. TRANSCRIPT: Court's Oral Decision Hearing, p. 72, L. 6-14.

Ms. Reed was awarded assets valued at \$667,524.00. TRANSCRIPT: Court's Oral Decision Hearing, p.69,L. 16-17. The debts awarded to Ms. Reed were in the amount of \$238,061.00, with the net value of the award determined to be \$429,463.00. TRANSCRIPT: Court's Oral Decision Hearing, p. 69, L. 18-20. Of this amount, \$333,099.00 consisted of funds held in various retirement accounts. TRANSCRIPT: Court's Oral Decision Hearing, p. 62, L. 8-22. This award did not include the equalizing judgment amount of \$198,642.00 discussed above. The **net** award to Ms. Reed, when this judgment is taken into consideration, would be \$628,105.00. Ms. Reed did not lack sufficient property to provide for her reasonable needs which is a factor the Court must consider under **I.C.32-705(1)(a)** and Judge Wayman did not so find.

I.C.32-705 (1)(b) requires the Court to consider whether or not the person seeking an award of attorney fees is unable to support himself or herself through employment. At the time Judge Wayman decided to award Ms. Reed a portion of her attorney fees and costs, he mistakenly believed that she was making only about \$20,000.00 per year. TRANSCRIPT: Court's Oral Decision Hearing, p. 72, L. 18-23. She was making at least twice this amount working two days a week. She could have earned over \$60,000.00 per year by working one more shift a week and the evidence established that she had been working three 12 hour shifts a week in 2010 a few months before trial.

Judge Wayman made a mistake when he found that Ms. Reed was only making a little over \$20,000.00 per year. Presumably he felt that Ms. Reed could not pay her attorney fees. This mistake is similar to the magistrate's misreading of an Exhibit in the *Jensen* case cited above which is discussed at pages 605 and 606 and which was found to have resulted in an incorrect analysis. This mistake should result in the reversal of the judgment for attorney fees and a remand back to Judge Wayman for a further determination with respect to whether or not Ms. Reed is entitled to an award of fees based on Ms. Reed's actual income level of \$41,042.56 (Plaintiff's Exhibit 43) and a potential income of over \$60,000.00.

In deciding to award Ms. Reed a portion of her attorney fees and costs, it is not apparent from the record that Judge Wayman considered the child support award of \$1,190.00 per month commencing in February of 2011. TRANSCRIPT: Court's Oral Decision Hearing, p. 36, L. 20-25, p. 37, L. 1. In *Jensen*, at page 606 Idaho, the magistrate's consideration of the child support amount as income in the context of determining whether or not to award fees under I.C.32-704 and I.C.32-705 was discussed and the Idaho Supreme Court did not find that this was error.

Monthly billing statements from Ms. Reed's attorney are attached to the Memorandum of Fees and Costs filed on November 21, 2011. R. Vol. 3, p. 570-654. The pages show that Ms. Reed kept up with her attorney fees and costs as the case progressed and that as of January 2, 2011, she had a zero balance owing. R. Vol. 3, p. 629. Mr. Phelps stated that he was the owner of PCG Consultants. TRIAL TRANSCRIPT, Vol. I, p. 98, L. 24-25, p. 99, L. 1. Attached as Exhibit C to the Memorandum of Costs was an invoice showing that as of February 18, 2011, PCG Consultants had been fully paid in the amount of \$10,000.00. R. Vol. 3, p. 640. Ms. Reed clearly had the ability to pay her own attorney fees and costs.

On June 19, 2012, the second Order and Judgment Regarding Award of Attorney Fees was entered. R. Vol. 4, p. 953-955. To avoid execution on this particular judgment, on July 9, 2012, Dr. Reed filed a Notice of Tender and paid into the Court the judgment amount of \$10,000.00 plus an additional \$100.00 to cover any accrued interest on the judgment amount. R. Vol. 4, p. 960-964. On August 30, 2012, Ms. Reed

obtained an order from the Court requiring that these funds be paid to her. A copy of this was not included in the original Clerk's record but was attached to Dr. Reed's Statement and Motion to Augment dated November 26, 2013. The judgment for attorney fees and costs should be set aside and Ms. Reed should be directed to pay Dr. Reed, the sum of \$10,100.00 plus interest on this amount from the date of tender on July 9, 2012. See *Radermacher*, cited above.

V

WAS IT ERROR FOR JUDGE WAYMAN TO ORDER THE TWO CORPORATIONS TO ISSUE STOCK AND DELIVER THE STOCK TO THE SHOSHONE COUNTY SHERIFF

On July 8, 2011, Ms. Reed's attorney filed an affidavit and obtained a writ of execution for the two judgments that had been entered in February of 2011. R Vol. 1, p. 230-239. A copy of this writ is at R. Vol. 1, p. 234. One of the two judgments was the February 2011, \$10,000.00 judgment for attorney fees which was ultimately set aside as was discussed above. The other judgment was a money judgment for \$198,642.00 which was entered to equalize a property and debt division.

The writ was given to the Shoshone County Sheriff's Office to execute on Dr. Reed's interests in both corporations. On July 15, 2011, a return of service was filed with the Court stating that the Writ of Execution had been served on Terry Spohr as an agent for the corporations, but was being returned as unsatisfied. R. Vol. 2, p.307-316. In response to the Interrogatories which had been served on Mr. Spohr as agent for both corporations, the office administrator, Paula Olson, stated that no physical shares of stock had ever been issued. She further stated that Dr. Reed had been paid \$5,000.00 as a partial buy out of his interests in Mountain Health Services, P.C. R. Vol. 2, p. 310.

On July 18, 2011, Ms. Reed, through counsel, filed an objection to the answers provided by the corporations concerning the stock in both corporations. R. Vol. 2, p. 349-352. Part of the relief requested was an order from the Court requiring both corporations to issue the shares of stock Dr. Reed was entitled to receive and to deliver a sufficient number of shares to the Shoshone County Sheriff's Office to satisfy the

judgments. This motion was scheduled for hearing several times with the actual hearing on the motion taking place on September 28, 2011.

On September 16, 2011, Dr. Reed filed an objection to Ms. Reed's Motion for Entry of Judgment/Order for Issuance and Delivery of Stock. R. Vol. 2, p. 380-389. His objection was based on the grounds that neither judgment was final and that neither would support a writ of execution. R, Vol. 2, p. 382. Additionally, he contended that both judgments had been superseded by the Amended Final Decree of Divorce which had been entered on June 11, 2011 (R. Vol. 1, p. 208-229) and were no longer enforceable. R. Vol. 2, p. 382-383. With respect to the attorney fee and costs judgment, he also contended, ultimately successfully, that this judgment had been entered in error because Ms. Reed had not been required to file a memorandum of fees and costs and Dr. Reed had not been given an opportunity to contest the amount claimed. R. Vol. 2, p. 383-384. All of these arguments were raised in the September 28, 2011 hearing wherein Ms. Reed asked Judge Wayman to order the corporations to issue stock and give them to the Shoshone County Sheriff. TRANSCRIPT: Various Motions Hearings, p. 59-61.

FEBRUARY 24, 2011 JUDGMENT FOR ATTORNEY FEES:

With respect to the judgment for attorney fees, Judge Wayman stated at the hearing which was held on September 28, 2011, that an issue had been raised that could affect the \$10,000.00 judgment for attorney fees. TRANSCRIPT: Various Motions Hearing, p. 66, L. 3-5. He stated that he did not feel that it would be appropriate to have an actual sale. TRANSCRIPT: Various Motions Hearing, p. 66, L. 11-12. At the hearing which was held on November 7, 2011, Judge Wayman orally set aside the judgment for attorney fees. TRANSCRIPT: Various Motions Hearing, p. 94, L. 5-25, p. 95, p. 96, p. 97, L. 1-7. On November 15, 2011, an Order was entered which set aside the February 24, 2011, \$10,000.00 Judgment for Attorney Fees. R. Vol. 3, p. 567-569.

As was stated above, in **Medical Recovery Services, L.L.C. v. Jones**, 145 Idaho 106, 175 P. 3d 795 (Ct. App. 2007), the trial court awarded attorney fees before a memorandum of fees and costs had been

filed. The Idaho Court of Appeals held that this was error and stated at page 110 Idaho that:

“In this case, the magistrate acted prematurely and improperly at the January 23, 2006 hearing by awarding a specific amount of attorney fees before having received a Rule 54(d)(5) memorandum of costs and fees and Rule 54(e)(5) affidavit which are necessary for the application of the Rule 54(e)(3) factors.”

In **Garrens v. Rollis**, 85 Idaho 86, 327 P. 2d 964 (1962), the Idaho Supreme Court stated that for a valid execution to issue, it must be supported by a valid judgment. In *Garren*, the Idaho Supreme Court stated at page 90 Idaho that “Under the due process clause of the Constitution of the United States, a personal judgment rendered without service of process on, or a legal notice to the defendant, in the absence of a voluntary appearance, is void and not merely voidable.” Similarly, on January 28, 2011, when Judge Wayman stated that Ms. Reed was entitled to an award of attorney fees and costs of \$10,000.00 (TRANSCRIPT; Court’s Oral Decision Hearing, p. 74, L. 14-21), he had dispensed with the requirement that Ms. Reed file an affidavit in support of her request for attorney fees as was required by **I.R.C.P. 54(e)(5)**. He had dispensed with the requirement that she file a memorandum of costs as was required by **I.R.C.P. 54(d)(5)**. He had also dispensed with the requirement that Dr. Reed be afforded an opportunity to object to the claimed fees and costs as was required by **I.R.C.P. 54(d)(6)**. To the extent the Writ was based partially on the February 24, 2011, attorney fee award (R. Vol. 2, p. 315), it was void.

FEBRUARY 24, 2011 JUDGMENT TO EQUALIZE DISTRIBUTION:

Under **I.R.C.P. 69**, process to enforce a judgment may only be issued to enforce a final judgment or a partial judgment which has been certified as final pursuant to **I.R.C.P. 54(b)**. In **Goldman v. Graham**, 139 Idaho 945, 947, 88 P. 3d 764 (2004), the Idaho Supreme Court defined the term “judgment” as “...‘the final determination of the parties in an action or proceeding.’”. (Cites omitted). The last sentence of **I.R.C.P. 54(a)** states that “A judgment is final if either it has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action.” In **Cit. Financial Serv. v. Herb’s Indoor RV Center**, 108 Idaho 820,

702 P. 2d 858 (Ct App. 1985), the Idaho Court of Appeals held, in part, that an uncertified partial summary judgment will not support a writ of execution. Ms. Reed was not entitled to obtain a writ of execution based on the February 24, 2011 judgment for \$198,642.00 because it was not a final judgment and because it was not certified as being final.

On page 11, in paragraph XVII of the Amended Final Decree of Divorce (R. Vol. 1, p. 218) entered on June 20, 2011, Dr. Reed was ordered to pay Ms. Reed \$198,642.00 as an equalizing judgment. This paragraph also stated that if Dr. Reed failed to make the payment, the Court would sign a civil judgment upon presentment. Similar language was set forth in the Amended Final Decree of Divorce with respect to the award of attorney fees on the bottom of page 11 and the top of page 12 of the Amended Final Decree of Divorce. (R. Vol. 1, p. 218-219). These provisions clearly superseded the same awards in the two February, 2011 judgments and required Ms. Reed to obtain additional civil judgments before she executed. She did not do this.

The two February 24, 2011, judgments merged into the Amended Decree of Divorce and were no longer in force as of the date the writ of execution was obtained on July 12, 2011. The writ was not premised on valid judgments and Judge Wayman should have made this finding during the hearing which was held on September 28, 2011.

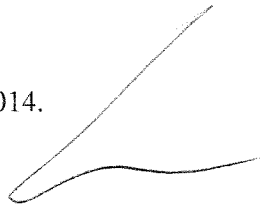
If the writ had been valid, **I.C.8-506C** would give the Court the authority to order the corporations to issue stock and deliver the stock to the Shoshone County Sheriff's Office. As was discussed above, the writ of execution was founded on two judgments which were superseded by the Amended Final Decree of Divorce. One judgment was a partial judgment which would not support a writ of execution. The other judgment was for attorney fees which was void and was ultimately set aside. The execution on and the attachment of personal property under the provisions of **I.C.8-501** et. seq. required valid judgments and a valid writ. (**I.C.8-504** and *Garren* above). Because the writ was not valid, Judge Wayman was not authorized by **I.C.8-516** to order the garnishee corporations to deliver Dr. Reed's stock in Mountain Health

Services, P.C., and Mountain Health Care, Inc., to the Shoshone County Sheriff.

CONCLUSION

Judge Wayman's valuation and award of the stock in Mountain Health Care, Inc., to Dr. Reed should be set aside. The equalizing judgment which was entered against Dr. Reed should also be set aside. The judgment for attorney fees should be set aside. The Court should order Ms. Reed to deliver any money or property she received when she executed on these judgments to Dr. Reed. The matter should be remanded back to the trial court for further proceedings.

DATED this 6th day of July, 2014.

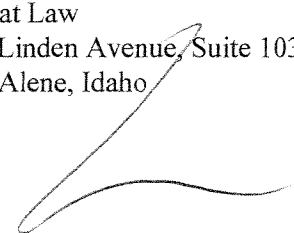


DAN J. RUDE
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of July,
2014, two true and correct copies of the foregoing
were mailed, postage prepaid, to:

SUZANNA L. GRAHAM, P.C.
Attorney at Law
302 East Linden Avenue, Suite 103
Coeur d' Alene, Idaho
83814



DAN J. RUDE
Attorney for Appellant

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November 11, 2010

Mr. Michael G. Palmer
Attorney at Law
Palmer | George, PLLC
923 North 3rd Street
Coeur d'Alene, ID 83814

Re: Dr. Scott A. Reed – Mountain Health Care, Inc.


Dear Michael:

Attached are the preliminary calculations regarding the value of Dr. Reed's ownership interest in Mountain Health Care, Inc. Federal income tax returns from the Company indicate Dr. Reed owns a 22.97% interest in the Company's stock.

Our preliminary conclusions indicate that the value of Dr. Reed's 22.97% ownership interest in the Company is worth \$100,000. This value is based primarily on the appraised value of the Company's real property as of August 19, 2010. The value of the Company's other assets and liabilities reported as of December 31, 2009 have been estimated and represent a relatively insignificant part of the overall value.

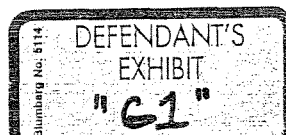
If you have any questions or concerns regarding the analysis or our findings, please let us know.

Respectfully Yours,



Todd A. Carlson, CPA/ABV, CFF
Moss Adams LLP

Schedule



ADMITTED IN EVIDENCE
DATE 1-13-10
JULY CLERK

Schedule 1

Dr. Scott R. Reed - Mountain Health Care, Inc.
Net Tangible Assets

| | Financial Statements | | Estimated Value | Notes |
|--------------------------------------------------|-------------------------|---------------------|---------------------|-------|
| | Dec-31-2009 | Adjustment | | |
| Assets | | | | |
| Cash & Cash Equivalents | \$ 125,590 | | \$ 125,590 | |
| Uncollected Accounts Receivable | 5,637 | | 5,637 | |
| Less Allowance for Production Adjustments | - | | - | |
| Intercompany Receivable - Mtn Health Services PC | 227,651 | (227,651) | - | a |
| Net Current Tangible Assets | 358,878 | (227,651) | 131,227 | |
| Land | 200,000 | | 200,000 | |
| Construction in Progress | 1,250,383 | | 1,250,383 | |
| Building & Improvements | 1,850,079 | | 1,850,079 | |
| Fair Market Value Adjustment to Appraisal | - | (800,462) | (800,462) | |
| Total Building & Real Estate | 3,300,462 | (800,462) | 2,500,000 | b |
| Office Equipment | 112,691 | | 112,691 | |
| Medical Equipment | 235,393 | | 235,393 | |
| Estimated Book Value @ 70% Cost | | (104,425) | (104,425) | |
| Total Equipment | 348,084 | (104,425) | 243,659 | |
| Accumulated Depreciation | (998,117) | 998,117 | - | |
| Loan Fees | 17,811 | (17,811) | - | |
| Accumulated Amortization | (3,738) | 3,738 | - | |
| Total Other Assets | 14,073 | (14,073) | - | |
| Total Assets | \$ 3,023,380 | \$ (148,494) | \$ 2,874,886 | |
| Liabilities | | | | |
| Accounts Payable | 18,421 | | 18,421 | |
| Payable to Shareholders, Net of Receivable | 38,066 | | 38,066 | |
| Long Term Debt | 2,383,252 | | 2,383,252 | |
| Total Liabilities | 2,439,739 | - | 2,439,739 | |
| TOTAL NET TANGIBLE ASSETS - EQUITY | \$ 583,641 | \$ (148,494) | \$ 435,147 | |
| Ownership Percentage - Dr. Reed | | 22.97% | \$ 100,000 | |

Notes

- a. Intercompany Receivable has been eliminated consistent with the consolidated financial statements.
The related payable should be removed as a liability of the related company in its valuation or treated consistently in the valuation of each individual entity.

b. For the appraisal dated August 19, 2010 prepared by Thomas H. Godbold, MAI.